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TOWARDS THE CONSTITUTIONAL PROTECTION OF ENVIRONMENTAL RIGHTS IN ZIMBABWE?

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INTRODUCTION

The increasing emphasis on environmental protection and ecological preservation, as well as Zimbabwe's crisis of development make it eminently desirable to analyse the conceptual values in which environmental law is based. It has been stressed that environmental law derives from the common interest of mankind, as does international recognition of human rights and freedom. It is thus normal that a link was established between the two as early as 1972, by the Stockholm Declaration itself which stated that:

Man (sic) has the fundamental rights of freedom, equality, and adequate conditions of life, in an environment of a quality that permits a life of dignity and well being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.¹

Thus, "the right to environment" was proclaimed at the beginning of the "environmental era" at a worldwide level. In addition, as it is formulated, this principle includes all the essential elements of both old and new fields of international law. It is very clearly linked with human rights, civil, political (freedom, equality, dignity) economic, social and cultural rights (adequate conditions of life, well being). It also warns that everybody has a responsibility for the protection and improvement of the environment. Finally, and this is new in human rights language, it also opens a time perspective by speaking of future generations.

The Stockholm Declaration, whatever its impact could have been, is legally only a non-binding document. So is the World Charter of Nature, solemnly proclaimed by the UN General Assembly on 28 October 1982, which elaborates further on the rights and duties resulting from the necessity to protect the environment and the Rio Declaration and its agreed programme of action, Agenda 21. Legal provisions with mandatory character have however, appeared in a very significant way in regional conventions aiming at the protection of human rights. The 1981 African Charter of Human and People's Rights expressly recognises in Article 24 the rights of "all people" to a "generally satisfactory environment favourable to their development". Inside another human rights protection system, the American Convention, an additional Protocol to the Convention on Human Rights in the Area of Economic, Social and Cultural Rights (the Protocol of San Salvador), provides in its Article II that:

- 1 Everyone shall have the right to live in a healthy environment and to have access to basic public services.
- 2 The states Parties shall provide protection, preservation and improvement of the environment".²

1 UN General Assembly Res. 37/7.

2 Protocol adopted at San Salvador on 18 Nov. 1988 28, ILM 698 (1989).

Additional, particular aspects of environmental rights are dealt with in international conventions dealing with specific issues as well as in customary, international law. Because of its character it is found embodied in other existing systems of international law, such as the UN Law of The Sea, international economic law and international labour law. Clearly the right to environment has been recognised in positive international law. It has also been proclaimed in national legislation. At present, clauses relating to environmental protection, either as a duty of state or as an individual right or both, feature in 45 national constitutions and in a dozen state members of federal states and in numerous general laws of several countries.

Although the formulations are different, in all these cases one may speak of a right to environment. Indeed, the drafting of most environmental conventions guaranteeing fundamental rights and freedoms shows that very often such rights and freedoms are proclaimed not only in an abstract form, but also by declaring that it is the duty of the state to protect them. The right to environment is as concrete in its implications as any other right guaranteed to individuals and groups. It includes procedures assuring that every individual is informed on time of major changes that could harm his or her environment; he or she is enabled to participate in the decision making process and has access to adequate means of redress, either for violation of rights or in order to obtain satisfaction if his or her environment has already suffered damage.

One of the aspects of this new right, the right to participate, also presumes an active attitude on behalf of citizens, and even more, a citizen's duty to protect the environment. Each person has the right to have his or her environment protected, but is also obliged to contribute to the common effort. The term "individuals" includes groups of individuals, such as associations or interest groups. This obligation to contribute to the common effort is even more far-reaching than the general obligation that results from the conventions recognizing human rights, that is the duty to respect the fundamental rights and freedoms of other individuals, since it emphasizes that citizens are not passive beneficiaries, but partake of responsibilities on formation of all community interests.

ENVIRONMENTAL RIGHTS WITHIN THE GENERAL HUMAN RIGHTS DISCOURSE

Although "human rights" have been the subject of philosophical thought since almost the beginning of organised society³ they did not receive concerted attention by all of mankind until after the end of the Second World War. However, before then the civil and political components of human rights had received legal articulation mostly after the French and American Revolutions. It was after these revolutions that issues of protecting human rights through constitutional means and mechanisms received some fairly focussed attention.⁴ Human rights which were largely defined to embrace and encompass only civil and political rights, later categorised as the first generation rights, have now expanded at a very fast pace in historical terms so much so that today human rights fall into three broad categories, namely, the first generation rights (embracing civil and political rights protected in virtually all written constitutions in the world) second generation rights (embracing socio-economic

3 The doctrine of human rights has its roots in the theory of natural law and its emphasis on the individual as a bearer of natural rights in his state of nature (Locke (1632-1704). Locke postulated, on the basis of the equality of all, the entitlement, as a matter of natural right, of every individual to control his own life.

4 James Madison's works in *The Federalist* provide some of the most insightful philosophical conceptions of human rights during this period.

rights most forcefully articulated and asserted after the socialist revolutions in Eastern Europe), the third generation rights (encompassing an omnibus array of ideas and rights which have little thematic coherence). This classification is by no means rigid and is somewhat flexible and fluid, particularly when regard is had to the fact that many of the rights falling in each category interrelate and are often intertwined in practice.

Broadly speaking though, the first generation of human rights embraces the political and civil rights of the individual *qua* individual, which are his entitlements as against the state generally to secure his freedom, liberty and autonomy from intrusive and arbitrary state action.⁵ The fundamental basis or purpose of this generation of rights is generally to secure the freedoms and liberties of the individual from arbitrary state action. Essentially, they are negative rights of the individual not to be unduly interfered with by the state and state institutions. It is often said that these rights do not require any positive action on the part of the state and hence their general acceptance by persons and states of all ideological and political persuasions as true rights in the classical sense of rights as claims or entitlements of the individual to be "left alone" by the state. At the international law plane these rights received unqualified acceptance within the terms and provisions of the Universal Declaration of Human Rights (1948) and more particularly in the UN Covenant on Civil and Political Rights.⁶ Since their first articulation and formulation in the famous French Declaration of the Rights of Man and later in the American Constitution, this generation of rights has been included in practically all bills of rights and national constitutions across the breadth and width of the entire world.

In contrast to the first generation rights, second generation rights are more concerned with and are therefore focused on social, economic and cultural fundamental issues. By their nature, as social, economic and cultural rights, second generation rights require or are somewhat dependant on positive action by the state or state institutions. The historical roots of this category of rights are to be found in the Russian Socialist Revolution. However, they received universal articulation and recognition through, firstly, the Universal Declaration of Human Rights⁷ and secondly and more particularly through the United Nations Covenant on Economic, Social and Cultural Rights. Although this category of rights has received unequivocal articulation and acceptance on the international law plane, there remains a somewhat large body of opinion among jurists and lawyers which rejects the notion that socio-economic rights are human rights in the classical understanding of that term as claims and entitlements enforceable within the judicial process. It is often argued (sometimes very strongly) that socio-economic rights (which include the right to education, the right to work, the right to health, the right to housing, the right to food and the right to leisure) are not human rights *strictu sensu* as they are incapable of enforcement by way of judicial remedies. It is principally for this reason that most socio-economic rights have not found their way into many national constitutions. Several of the countries which have included them in their national constitutions have done so not as part of the justiciable Declarations of Rights, but merely as part of Guiding Principles of State Policy or Directives of State Policy or Fundamental Principles of State Policy or Government. However, there is a significant number of countries which has included socio-economic rights such as the right to education, the right to work and the right to health in their national constitutions.

5 These rights include *inter alia* the right to life, liberty, privacy, equality, freedom from torture, freedom of association, assembly, expression and movement.

6 Virtually all Regional instruments on Human Rights recognise and seek to protect this generation of rights.

7 see Articles 23 to 28.

There is no great difficulty in the conception of socio-economic rights as rights, but the main difficulty relates to their enforceability or rather the procedures and mechanics of enforcing them when they have been violated since it is clear that the traditional judicial enforcement mechanism is ill-suited for the enforcement of these rights.

Third generation rights also face the same conceptual and enforcement problems/difficulties as socio-economic rights. Third generation rights, as already noted above, are of recent origin in terms of their conceptualisation and articulation. Indeed, only in the last two decades have this category of rights been articulated and formulated with any degree of seriousness. Third generation rights were first conceptualised by Karel Vasak in his inaugural speech to the Tenth Session of the International Institute of Human Rights in Strasbourg, France, in 1979.⁸

He stated that they:

are new in the aspirations they express, are new from the point of view of human rights in that they seek to infuse the human dimension into areas where it has all too often been missing, having been left to the State, or States . . . [They] are new in that they may both be invoked against the state and demanded of it, but above all (and herein lies their essential characteristic), they can be realized only through the concerted efforts of all the actors on the social scene: the individual, the state, public and private bodies and the international community.⁹

The third generation human rights have been variously described as rights of solidarity: collective rights, or rights of every human being and of all human beings taken collectively, synthetic rights, consolidated rights, communal rights, rights of people, or populist or popular rights, joint rights of individuals and other groups, or rights exercised by individuals separately and jointly and new rights or new dimensions of existing rights.

There has been considerable debate on the point whether a third generation of human rights should be, or can be, conceived of. In regard to the right to development there was a diverging opinion. Keba Mbaye, then Chief Justice of Senegal and later Vice-President of the International Court of Justice, sought to discover the right to development in the existing instruments of international law. Vasak, on the other hand, is emphatic that a new generation of human rights must be admitted, reflecting the need to recognise rights of solidarity. The different views demonstrate what is becoming increasingly apparent: that a clear demarcation is not always possible between human rights of the different generations. The comprehensive terms in which a human right may be defined often enable a fair degree of overlapping across two or three generations of rights.

A PLACE FOR ENVIRONMENTAL RIGHTS

Where do environmental rights find a place? It will be evident that having regard to the wide sweep covered by such a right, it can find a place as a "first generation" right, as a "second generation" right and also as a "third generation" right.

The right to environment is rooted in the right to an acceptable quality of life, which, in certain circumstances, extends to the right to life itself. The Preamble to the United Nations

⁸ see K. Vasak, "A 30-Year Struggle: The Sustained Effort to Give Force of Law on the Declaration of Human Rights" *UNESCO Courier*, Nov 1977, p29. and J. D. Van der Vyver, "State Sovereignty and the Environment in International Law" *SALJ* Vol. 109, 1992 472 at p482.

⁹ As quoted by S. P. Marks, "Emerging Human Rights: A New Generation for the 1980s?" (Stoffer Lecturers), 33 *Rutgers Law Review*, 397, 441 (1981).

Charter specifically refers to fundamental human rights, the dignity and worth of the human person as well as the right to better standards of life. In Article 1 (3) of the Charter, there is a reference to promoting and encouraging respect for human rights and fundamental freedoms. If the right to a healthy environment is treated as an aspect of the right to life, it can be founded on Article 3 of The Universal Declaration of Human Rights and in Article 6(1) of The International Covenant on Civil and Political Rights. The right to life in those provisions will need to be construed liberally, because in its narrow and strict sense, in the context in which the right appears, it would seem confined to the protection of the individual against physical death. In the Preamble to the Stockholm Declaration of 1972 the enjoyment of a healthy environment has been linked with the right to life.

Further under the general phrase, the right to a healthy environment, the following rights are important:

- (a) **The right to be safe from harmful exposure**, meaning that citizens have the right not to be exposed to harmful pollutants and toxic substances.
- (b) **The right to know**, what kind of toxic substances are in or passing through their neighbourhoods. Citizens have the right to know what dangerous substances, such as pesticides, are being transported through their areas.
- (c) **The right to cleanup**, Citizens have the right to know whether measures are in place to clean up dangerous products such as petrol/diesel in the event of a spill.
- (d) **The right to participate**, is important in getting community support in development or any other projects. Often communities are taken for granted and their views are often not considered.
- (e) **The right to compensation**, Citizens have the right to demand compensation if a toxic spill causes environmental damage.
- (f) **The right to prevention**, Prevention is always better than cure, and citizens have the right to demand that all preventative measures be in place before high risk projects are established and before resources are overexploited.
- (g) **The right to protection and enforcement**, which guarantees that citizens are adequately protected from harmful substances and pollutants, and that adequate measures are in place to enforce any regulations deemed necessary to protect citizens' right to a healthy environment.

The growing emphasis on environmental protection and the need to find a legal basis for it in the right to life illustrates how a new human right may emerge as the manifestation of a primary human right. While the right to a healthy environment is not expressly mentioned in the International Covenant on Civil and Political Rights, specific mention is made in Article 12(2)(b) of the International Covenant on Economic, Social, and Cultural Rights of the obligation on the state to provide for "the improvement of all aspects of environmental hygiene". If the right to a healthy environment can be construed as implied in the provisions of the Universal Declaration and its two Covenants and the several international treaties and conventions that flow from them, it may be said that the right to a healthy environment can be exercised not only against other states, that is to say, for transnational environmental injury, but also against one's own state, for local environmental damage. If the right to a healthy environment can be traced to both the International Covenants, of Civil and Political Rights and of Economic, Social and Cultural rights, it can be exercised not only as a right against the state to ensure against environmentally harmful acts but also as a right to call upon the state to provide the conditions for a healthy environment. It is both a negative right and a positive right.

There is, however, another aspect to environmental rights. They are generally rights that belong to groups of individuals. In certain cases, they may have a regional and even a global dimension. A nuclear fallout or acid rain may affect an entire region. The depletion of the ozone layer and the greenhouse effect could have consequences affecting the entire planet. Clearly, the regional or global dimension implied in the consequences would bring the right to a healthy environment into the list of "third generation human rights". Thus within international customary law we have seen the principle of good neighbourliness emerge.¹⁰ The principle recognises, notwithstanding the sovereignty of nations, their environmental responsibilities to each other.

The right to a healthy environment includes a large number of different facets and therefore traverses and overlaps the first, second and third-generation groups of human rights. Because of the nature of environmental rights, the several facets are members of a single environmental system. It is a system that is indivisible, it is not capable of dissection and separation into individual, independently operating parts of the whole. The intimate interaction and interdependence between its different parts requires us to view the environmental system from a holistic perspective as a single, indivisible, and closely integrated operating system.

The third generation rights include the right to nature conservation and to a clean, safe and healthy environment, the right to share in the common heritage of mankind, the right to peace and the right to development. Third generation rights have also often been referred to as people's or solidarity rights so as to capture one important aspect which underlies them, namely that they are essentially group or community based rights which are often claimable not by individuals but by individuals in groups. Environmental rights have been conceptualised as falling squarely within this category of rights and are often referred to as green rights. Their aim is not to limit or stifle development but to ensure that developmental projects incorporate environmental criteria or environmental impact assessment with a view to ensuring that development is carried out within a framework which stresses the importance of environmental factors which may be varied depending on a variety of factors.

In Africa environmental concerns and issues include droughts, floods, soil erosion, locust invasions, desertification, dangerous pesticide infections, water pollution and air pollution. These are some of the many social and economic problems which environmental rights issues seek to address. Because these problems generally affect whole groups of people, the emphasis of environmental rights, and indeed the whole range of third generation rights, is, unlike first generation rights, not on the individual *qua* individual, but on communities or groups as collective beneficiaries and bearers of these rights. Furthermore, because issues of environmental protection and development closely affect, not just present generations, but also future generations who have claims to a healthy environment for their own survival and development in the future, environmental rights are not confined to *personae in esse* but also naturally include the demands and entitlements of future generations. Because the broad range of environmental issues/concerns are often affected by events and acts taking place outside the boundaries of a single country, adequate protection and development is not just a concern of national law or municipal constitutional protection but requires international co-operation on global and regional scales.¹¹

10 See for example *Trial Smelter arbitration, USA v Canada* 1941.

11 See generally J. D. Van Der Vyver, *op cit* note 9 at pp 482-483.

The content of the right may be found within international policy agreements as well as in environmental conventions dealing with specific environmental problems. Such conventions determine what the right to environment means in concrete as opposed to abstract terms. It is important therefore to consider the general trends within these conventions.

At the policy level, agreements such as the Stockholm and Rio Declarations recognise the intricate link between environment, development and human sustainability. These agreements clearly locate environment as a social and development issue. In this respect the issue of equity in the enjoyment of this right is paramount both as intra the current generation and between generations. This clearly places a responsibility on both individual and state action to ensure that their activities do not negate the rights of others. In this sense clear obligations are created. The Convention to Combat Desertification places a general obligation on parties to take an integrated approach to dealing with desertification.¹²

The international environmental conventions adopted since UNCED develop the basic concept of public participation in environmental management, enunciated in the Rio Declaration and supported in Agenda 21. These include, the Framework Convention on Climate Change, the Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, the Convention on Bio-diversity and the Convention to Combat Desertification. These Conventions give effect to this right of participation by describing the specific areas in which the public or sections thereof must be protected. This right of participation recognizes the rights of specific groups, including the rights of indigenous people and women. The specific link between indigenous people and the conservation of bio-diversity is made in Article 8 of the Bio-diversity Convention even though it is not formulated as an inalienable right. Further Agenda 21 provides in Chapter 26 that:

Indigenous people and their communities have a historical relationship with their lands and . . . have developed over many generations a holistic traditional scientific knowledge of their lands, natural resources and environment . . . national and international efforts to implement environmentally sound and sustainable development should recognise, accommodate, promote and strengthen the role of indigenous people and their communities.

This linkage is important because in certain contexts the traditional resource rights of indigenous people, as defined in International Conventions such as ILO Convention 169 on Indigenous People and within International cases such as western Samoa, may in fact be a critical aspect of an environmental right. The Convention to Combat Desertification places an obligation on Contracting Parties to facilitate the participation of local populations, particularly women and youth.¹³

Another notable feature is the development of a right of access to information. Principle 10 of the Rio Declaration provides that:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

12 Article 4.

13 Article 5.

It is important to note that the language used is prescriptive. In the Biodiversity Convention this right of access to information is seen as critical for the exercise of prior informed consent.

The right to a healthy environment constitutes a jurisprudential reality. It has matured from an abstract concept to operating law. Because of its character, it is additionally found embodied in other existing systems of international law; for example, in the law of the sea, international economic law, international labour law. Undisputably it has found a place in the existing international law.

There is a need though, to put it together, identified as a definitive area of international law, self-constituted by its particular nature and its distinctive character, its conceptual underpinnings and its several facets, its operation as a system of law in constant interaction with other systems of law identified by their own conceptual character. What is needed is an integrated system of environmental law, centred on environmental concepts and values, that will address itself with particularity, and explore all possible approaches, to the task of finding solutions to various environmental issues. Bearing in mind the second areas of overlap between environmental law and other systems of law, the task is not an easy one.

It is possible to conclude that the international law of human rights can provide an appropriate value structure for environmental rights. It will be found that certain material incidents peculiar to both the human rights system and environmental law follow a common pattern. Human rights as well as environmental law have to deal with an area where the doctrine of national sovereignty has to give way to external concern in relation to a national activity. The veil of sovereignty cannot be employed to shut out the operation of the international law of human rights nor the applications of environmental law principles. Moreover the international law of human rights, unlike traditional international law, which is designed "to serve common rights law, despite the plurality of national cultures and economies, makes it fit as a medium of values for the operations of an environmental law system in which multiple perspectives and flexibility of procedures may be a significant feature".

The evolution of environmental protection and human rights protection discloses many affinities and both are undergoing a process of globalization. A bridge between the two lies in the fundamental rights to life and health in their extended dimension, comprising negative as well as positive measures. Furthermore, the protection of valuable groups, such as indigenous populations, lies at the confluence of environmental protection and human rights protection, suggesting the need for bringing together human and environmental considerations.

These several aspects point to the admirable suitability of human rights values for providing a conceptual framework for environmental law.

ARGUMENTS AGAINST ENVIRONMENTAL RIGHTS AS HUMAN RIGHTS

The question of environmental rights as human rights is not without controversy. Objections to the recognition of environmental rights as human rights exist at both the conceptual and practical levels. Jack Donelly has strongly argued that:

The third generation of solidarity rights simply are not, and logically cannot be, human rights — unless 'human rights' are now taken to mean something other than it has always meant.¹⁴

14 Jack Donelly, "In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development (1985) 15 *California Western International Law Journal* 473 at p. 493.

Further and commenting more specifically on the right to development (one of the cluster of rights falling under third generation rights) J. Donnelly insists that the right to development and by necessary implication the right to a healthy and sustainable environment "is not just a charming delusion, but is a threat to human rights, and a particularly insidious threat because it plays upon our fondest hopes and best desires, and diverts attention from more productive ways of linking human rights and development". Phillip Alston¹⁵ argues that not only do arguments classifying environmental rights and developmental rights as human rights open up a Pandora's Box of new rights, but insists that "the concept of third generation solidarity rights would seem to contribute more obfuscation than clarification in an area which can ill afford to be made less accessible to the masses than it already is"¹⁶ Richard Bilder¹⁷ makes about the same warning:

to the extent human rights increasingly embrace the whole range of social aspirations, their usefulness as an ordering concept may be distorted, diminishing their helpfulness in solving crucial and recurrent conflicts between competing values which every society confronts¹⁸

It seems evident that the present broad and indiscriminate, use of the term 'human rights' may obscure what are in fact very different types of social ends and that various human rights may have very little in common but their label.¹⁹

In the same vein J. D. Van Der Vyver has also remarked that:

There is indeed the danger that undisciplined extensions of any particular value structure might exceed the periphery of its true meaning, and, by virtue of the generality thus introduced into the core definition of that value structure, render its exact nature and confines exceedingly vague, confusing and controversial.²⁰

It was perhaps in realisation of this potential for labelling each and every social or economic or political demand or claim a human right that the United Nations General Assembly passed Resolution 41/127 of 1987 which outlines some guidelines in the development of international instruments defining human rights. These guidelines require that international human rights instruments be consistent with the existing body of international human rights law; be of a fundamental nature or character and derive their content and substance from the inherent dignity and worth of the human being; be sufficiently clear and precise to found an identifiable and practicable right and an attendant obligation; be capable of realistic and effective implementation and also be capable of attracting broad international support. It has been stated that these guidelines were "clearly intended to place a damper on overzealous efforts to bring all kinds of unrelated values and interests within the confines of human rights protection".²¹

Other scholars do not share this pessimism about the conceptualisation of environmental rights or rather third generation rights as rights. For example Louis Sohn observes that "[t]hese rights are still human rights; the effective exercise of collective rights is a

15 "A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?" (1982) 29 *Netherlands International LR* 307.

16 See particularly at p. 321-322.

17 "Rethinking International Human Rights: Some Basic Questions" 1969 *Wisconsin Law Report* 172.

18 At p. 175.

19 At p. 176.

20 *Op cit* at note 9 p. 483.

21 *Ibid*, at p. 484.

precondition to the exercise of other rights, political or economic or both. If a community is not free, most of its members are also deprived of many important rights".²²

In the same vein Alexander Kiss and Dinah Shelton have strongly argued that the right to a safe and healthy environment is a conceptually sound human right which reinforces and complements other human rights.²³ Whatever reservations may exist among jurists about the character of environmental rights as human rights and also notwithstanding the inherent enforcement difficulties of all human rights which require positive state action, there is today little doubt that the right to a safe and healthy environment, however formulated, has been received, recognised and implemented in many municipal national constitutions. As J. D. Van Der Vyver has aptly observed:

Though there might be problems in constructing the interests pertaining to a clean and healthy environment as 'rights' in the technical sense, of a future generation — the future generation should perhaps be seen as being amongst the beneficiaries of the right and not the holder *per se* — the practice of defining human-rights-holders in collective rights might require 'ingenious procedural rights', but here, too, such devices are already at hand, including all the mechanisms of human rights implementation devised by international law, ranging from reporting systems and adverse publicity to censuring unbecoming conduct by means of sanctions and foreign intervention; and in municipal jurisdictions including class actions or even the more general *actio popularis*. Nor is the generality or lack of precision of the concept of 'environment' an insurmountable obstacle to translating environmental concerns into the framework of rights structures.²⁴

OBJECTIONS AGAINST THE CONSTITUTIONALISATION OF ENVIRONMENTAL RIGHTS

Even though a constitutional right to environmental integrity has been recognised in numerous constitutions across the world and breadth of the world, as will be seen later, there remains a significant body of opinion among jurists which is totally opposed to the idea of the constitutionalisation of environmental rights, as human rights. The objections of this body of opinion explains, for instance, why such leading Western countries as Germany, France and the United States of America, have not adopted environmental rights as part of their national constitutions. In this section we briefly summarise the main arguments which have been put forward in opposition to the constitutionalisation of an environmental right as a fundamental human right. Professor Andre Rabie²⁵ has succinctly and effectively summarised the arguments against the recognition and constitutionalisation of an environmental right as a human right. We can do no better than quote in full his summary:

1. The right cannot be formulated with sufficient clarity. This applies both to the concept 'environment' and to adjectives sought to qualify it
 - a) While the meaning of 'environment' is mostly simply taken for granted, there is considerable uncertainty among those who seek clarification as to what is

22 "The New International Protection of the Rights of Individuals Rather than States" (1982) 32 *American University Law Report* 1, at p. 48.

23 Alexander Kiss and Dinah Shelton, *International Environmental Law*, (1991) at p. 22.

24 *op cit* note 9 at p. 484.

25 Andre Rabie, "A Constitutional Right to Environmental Integrity: A German Perspective" *South African Journal of Human Rights*, 208.

to be subsumed under the concept. It may be a restrictive meaning, relating only to the natural environment or it may be used in a comprehensive sense as encompassing the human environment, thus including also the built, cultural, social, political and economic environment.

- b) Among the adjectives which have been suggested to qualify 'environment' are clean, best possible, reasonable, befitting a human being, humane, healthy, unharmed, unimpaired, safe, [decent, appropriate, balanced, suitable and favourable]. A conspicuous characteristic of these adjectives is their vagueness and intangibility. Moreover there is no indication as to the degree to which these adjectives should oblige the state to effect the required conservation.
- 2 Natural environmental media such as air, water, land etc, unlike the objects of other constitutional rights, do not relate to individual interests. In fact they accommodate interests that are shared commonly by the entire public. An individual has a right to his/her life, his/her health and his/her property, but not to his/her environment.
- 3 A fundamental objection to a constitutional right to environmental integrity is the relativity of such a right. Environmental conservation is only one of a number of assignments of the state. It has to be weighed against other societal and individual interests with which it may be in conflict. Primary among those interests is economic and technological development. A claim by individuals against the state to clean air, for instance, cannot be reconciled with a political system in which the legislature and the executive — not the courts — must set priorities. In effecting conservation many different interests need to be identified and to be balanced against each other A constitutional right to environmental integrity would often come into conflict with other constitutional rights, such as the right to property and the freedom to exercise one's occupation. Priorities need to be determined politically. Considerable uncertainty would arise if the courts of law were to decide such questions. In a democratic society, this issue is finally decided by elected representatives of the people, not by a court. In short, it is argued that the problem of identifying the need for environmental conservation and of weighing it against other rivaling interests requiring protection by the state, requires a political, not a constitutional solution.
- 4 It is contended that whereas the state can secure most of the classical constitutional rights by lifting existing limitations or simply by refraining from encroaching upon them, a right to environmental integrity would require a considerable degree of active intervention — something which the state may not be in a position realistically to accomplish. This, in effect, amounts to an objection in principle against second and third generation human rights which, instead of obliging the state to refrain from action, demands the state's intervention with a view to the rendering of certain services.
- 5 If a constitutional right to environmental integrity were to have "Dritt-wirkung", it would enable any individual practically to stop environmentally harmful activities of others, even though he may not have been personally affected. On the other hand, such a right without "Dritt-wirkung" would seem to have limited effectiveness since most environmentally harmful activities are undertaken not by the state but by other individuals. Nevertheless, since many individual actions which affect the environment require official approval, a constitutional right may yet influence the state's role in granting such approval and thus indirectly serve to restrain such individual actions.
- 6 It is foreseen that the introduction of a constitutional right to environmental integrity may excite claims by other (often opposing) groups also to have their interests constitutionally protected, e.g. claims by industrialists, economists and others for the introduction of an equivalent constitutional right to 'development'.
- 7 It is feared, finally, that on account of the above mentioned difficulties the practical effect of such a right will be limited and that this may lead to disillusionment

among those who may have held high expectations that the introduction of such a right would guarantee a satisfactory environment. This may even have a further detrimental effect as regards reliance upon constitutional protection as a whole.²⁶

Virtually all the above objections to the constitutionalisation of environmental rights can be overcome with relative ease. Indeed some of them are not substantially valid objections. For example, the objection that the right to environmental integrity is a typical "third generation" right which requires active state intervention or other intervention is not entirely true as there are aspects of it which generally would be realised or satisfied if the state and other institutions/persons merely refrained from engaging in activities which harm the environment. These aspects simply require the state, industrialists and others to simply go about their business or activities in such a way as would not result in environmental pollution or degradation, for instance. This is not different conceptually, at least, from requiring the state to go about the business of governing in a manner which does not, for example, result in wrongful arrests, unlawful deprivations of property or unlawful discrimination. In other words, in this sense an environmental right is no more than a right to "leave the environment alone", that is, not to do anything which would destroy or compromise it. That there are competing interests of development and the like is not different from saying the right to liberty should be balanced against the dictates of state security or that the right to property should be balanced against public interests.

The courts have been able to deal with these competing interests in relation to the usual first generation rights and they, it is submitted, are equally equipped to deal with the competing interests between environmental protection and industrial or other development.

While it is true that an environmental right cannot be formulated with definite clarity or mathematical exactness, the same is true of all other rights. There is nothing exact or absolutely definite about the freedom of movement or the freedom of religion or indeed the right to liberty itself. All human rights have a penumbra of uncertainty about them until the courts definitively interpret its boundaries. Thus there should be no insurmountable difficulties in the courts founding and defining the boundaries of the meaning of the term "environment" and indeed those adjectives which are used to qualify or explain it, such as healthy, safe, balanced, clean. All these terms, like all other terms, are capable of judicial interpretation within the specific context of the cases the courts would be called upon to adjudicate upon.

In any event, the courts are not, as will be seen later, the only or exclusive agents for the enforcement of human rights. The international law arena, for example, is replete with non-judicial methods for the enforcement and promotion of human rights.

To object to environmental rights by arguing that while in respect of first generation rights an individual may say he/she has a right to his/her life and whereas it is not possible for an individual to assert his/her right to an environment is not only pedantic but also fundamentally flawed. Why can't an individual claim his own individual right to his/her clean or healthy or safe environment? The fact that the environment may be shared with others does not in anyway suggest that each and every individual cannot claim as an individual his/her right to a healthy or clean environment.

Further, the argument that third generation rights are not true human rights because they require positive state action is also inherently problematic, for the reason that first generation rights also require some positive state action. For example, the right to life is violated if the

state does not take measures to protect persons from being unlawfully killed by others in the same way that the right to property is violated if the state does not take positive steps to put in place measures (the courts and the police for instance) to ensure the defence of property. There are very few human rights which do not require the state to take some positive steps to ensure an environment conducive to their realisation or protection. The same is true of environmental rights. The degree of state intervention and the amount of resources would vary, but conceptually most human rights do require some positive state action if they are to be meaningful in practice.

The argument that the state may not achieve the optimum conditions for the full realisation of a right to environmental integrity is equally inadequate to defeat the categorisation of environmental rights as fundamental human rights since that argument is also true of many other human rights. In every country, for example, the optimum conditions for equality before the law or equal protection of the law, or for freedom of expression or association are hardly ever achieved. But that does not suggest that the right to equal protection of the law or for equality before the law should not be recognised and constitutionalised as a fundamental human right.

The fact that a right may not be fully realised in practice and that people may be disillusioned about this, is not an argument at all in the same way that it is not an argument to say that because some human rights are honoured more in their breach than in their observance they should not be constitutionalised as human rights. The real issue is to seek ways and means of ensuring that those rights which are often honoured more in their breach than their observance are more effectively protected. One does not prescribe death for an ill patient but prescribes a curative medicine.

One of the fundamental questions is: What is the content of an environmental right and how is it to be formulated for constitutionalisation purposes? The answer to this question is made more difficult by the fact that, the term "environment" refers to a whole range of issues, subjects and matters which include land, soil, water, air, vegetation, animals, fauna and flora. In this regard environmental issues are extremely complex and are still far from being fully understood considering that they are concerned with a wide range of subjects including the maintenance of ecosystems, essential ecological processes and biological diversity in all forms of natural resources including forests, trees, grass, plants, animals, insects, reptiles, waters, air, rivers, mountains, plains and vleis. The interactions, interfaces, interplays, and relationships between and among all the above constitute the content of the general subject matter of environmental rights and concerns.

It is for this reason that legal instruments have rarely sought to define or circumscribe the boundaries of what constitutes environmental rights. The result is generally a plethora of legal provisions which simply talk of environmental rights without any attempt to concretise or circumscribe these rights. Thus the content of environmental rights has remained somewhat vague and abstract except to the extent that there exist international instruments on this right which have dealt or which deal with various aspects of environmental rights such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); the Convention on Biological Diversity which defines biodiversity as "the variability amongst living organisms from all sources including *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexities of which they are part, this includes diversity within species, between species and of ecosystems"²⁷ and the Basil and Bamako Conventions on the Management of Hazardous Waste.

27 Article 2.

There is nothing conceptually too different about a human right to environmental integrity which would make its constitutional protection unhelpful in effectively protecting the environment in practice.

COMPARATIVE MUNICIPAL CONSTITUTIONAL APPROACHES TO ENVIRONMENTAL RIGHTS

Since environmental rights were not in vogue during the times when most of the world's oldest constitutions were crafted and drafted, it is not at all surprising that all such "old" constitutions do not contain any provisions relating to environmental rights. For example, the Constitutions of the United States of America, France, Sweden, Denmark and Norway do not have any specific and direct provisions dealing with or relating to environmental rights. It is thus to the relatively more modern constitutions that we must make reference in order to establish the various comparative approaches which have been adopted by various nations in the process of constitutionalising environmental rights.

That the constitutional protection of environmental rights has received wide recognition and implementation in modern national/municipal constitutions is no longer in doubt, even though environmental rights are of relatively recent origin. A survey of those constitutions which provide for some form of recognition of environmental rights reveals interesting and varied approaches not only to the formulation of the right but also to methods and styles of recognition and implementation. These approaches may be classified into eight related and sometimes overlapping and intersecting categories or forms of recognition. Each of these approaches is discussed in turn hereunder.

- (A) Firstly, there are those constitutional provisions/clauses which simply confer an environmental right to each and every citizen/person mainly under the provisions of the Bill/Declaration of Rights within the Constitution. This approach is rare and examples of it are to be found in the Russian, Peruvian and Hungarian Constitutions. The Constitution of the Russian Federation in Article 42 provides that:

Everyone shall have the right to a favourable environment, reliable information about its condition and to compensation for the damage caused to his or her health or property by ecological violations.

Article 123 of the Constitution of Peru states that:

Everyone has the right to live in a healthy environment, ecologically balanced and adequate for the development of life and the preservation of the countryside and nature.²⁸

- (B) Secondly, there is the approach which does not confer an environmental right on citizens but merely places a duty on them to protect the environment. This approach is also rare and an example is found in the old Article 55 of the Constitution of Ethiopia which stated that:

Ethiopians have the duty to safeguard and care for socialist property. Ethiopians have the duty to protect and conserve nature and natural resources, especially to develop forests and to protect and care for soil and water resources.

- (C) Thirdly, there are those Constitutions which simultaneously confer an enforceable environmental right on citizens and also place an obligation on them to protect, preserve and develop the environment. Such provisions are normally found within

²⁸ The equivalent provision in the Hungarian Constitution is to the same effect even though worded somewhat differently.

the Bill/Declaration of the Rights and Duties of Citizens. Countries with such provisions include Bulgaria, Mozambique and Poland. For example, Article 55 of the Bulgarian Constitution states that:

Citizens have the right to a healthy and favourable environment, consistent with stipulated standards and regulations. They have an obligation to protect the environment.

Similarly, the Constitution of the Republic of Mozambique in Article 72 provides that:

All citizens shall have the right to live in and the duty to defend, a balanced natural environment.

The Polish equivalent provision is somewhat different in that rather than granting a right to a safe or healthy or favourable environment which would connote the preservation of a stable natural environment, it actually confers a right to "benefit" from the environment by stating as follows:

Citizens of the Polish Republic shall have the right to **benefit** from the natural environment and it shall be their duty to protect it²⁹ [emphasis added].

The significance of this formulation is that it emphasizes the right to derive benefit and therefore the right to use/utilise the environment as opposed to the Mozambican and Bulgarian approaches which emphasize the maintenance of the environment in a healthy or safe state or condition.

It is arguable that the Russian approach may in fact fall into this category because in addition to Article 42 cited above as an example of the first approach there is Article 36(2) which states that:

The possession, use and management of the land and other natural resources shall be freely exercised by their owners provided this does not cause damage to the environment or infringe upon the rights and interests of other persons.

It seems that the intention behind the second part of this clause is to place an obligation/duty on those citizens who may own land and other natural resources to protect and preserve the environment by simply using their property in a manner which does not injure, damage or prejudicially affect the environment. It is arguable that although this provision is limited to owners of landed property and natural resources and clearly would not apply to citizens who do not own either land or any form of natural resource, nonetheless it imposes the same duty on those to whom it applies as do the Mozambican, Bulgarian and Polish provisions cited above.

(D) Fourthly, there is the approach which grants an enforceable environmental right to citizens while simultaneously placing an enforceable duty/obligation on the state to take appropriate measures to preserve, protect and develop the environment. Constitutions which have adopted this approach include those of Mongolia, Nicaragua, Niger, Ecuador and South Africa. In this regard Article 16(2) of the Constitution of Mongolia provides that:

The citizens of Mongolia shall enjoy the following fundamental rights and freedoms:

- 1)
- 2) The right to a healthy and safe environment and to be protected against environmental pollution and ecological imbalance.

This provision is found within the justiciable Bill of Rights entitled "Human Rights and Freedoms". Clearly, the second part of paragraph (2) places a justiciable obligation on the state to protect citizens against pollution and ecological imbalance.

The Constitution of Nicaragua, Chapter III, entitled "Social Rights" provides that:

Nicaraguans have the right to live in a healthy environment and it is the obligation of the state to preserve, conserve and recover the environment and the natural resources of the country.³⁰

Under the Rights and Duties of the Individual the Constitution of the Republic of Niger in Article 28 states that:

Each person shall have the right to a healthy environment. The state shall be charged with protecting the environment.³¹

The South African Constitution provides in its Bill of Rights in Article 29 that:

- a) Everyone has the right to an environment that is not harmful to their health or wellbeing; and
- b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that —
 - i) prevent pollution and ecological degradation.
 - ii) promote conservation; and
 - iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

This is a somewhat more comprehensive formulation which, apart from identifying that the environmental right is for both present and future generations, seeks to identify the major areas in which state intervention to protect and guarantee the right is required. Further, the provision announces that environmental rights are to be balanced against the needs of economic and social development and thereby emphasizing that the thrust of the individual right to a healthy environment and the obligation of the state thereof is the sustainable utilisation and protection of natural resources.

(E) Fifthly, there is the Constitutional approach which requires and/or obliges the state or the national government to protect and preserve the environment or natural resources either as part of the substantive seemingly binding parts of the Constitution or merely as part of a clearly unenforceable preamble or statement of Guiding Principles of state policy. Countries with provisions falling in this category include Nepal, Sri-Lanka, Namibia, Malawi, Austria, Switzerland, Greece and the Netherlands.

In Part IV which contains unenforceable "Directive Principles and Policies of the State", Article 26(4) of the Constitution of Nepal states that;

The state shall give priority to the protection of the environment and also to the prevention of its further damage due to physical development activities by increasing the awareness of the general public about environmental cleanliness, and the state shall also make arrangements for the special protection of the rare wildlife, the forests and vegetation.

³⁰ Article 60.

³¹ Article 20 of the Constitution of Ecuador although formulated differently has the same effect. It states that "Without prejudice to other rights . . . the state guarantees . . . the right to live in an environment free of contamination. It is the duty of the state to be vigilant so that this right should not be affected and to guard nature's preservation. The law will establish the restrictions to exercise certain rights of liberties so as to protect the environment . . .".

Similarly, Article 27(14) of the Constitution of Sri-Lanka which falls under unenforceable Directives of State Policy³² states that:

The state shall protect, preserve and improve the environment for the benefit of the community.

The similarly none binding equivalent provision of the Namibian Constitution which is also part of Principles of State Policy found in Chapter II of the Constitution but which is more comprehensive and more elegantly formulated provides that;

The state shall actively promote and maintain the welfare of the people by adopting *inter alia* policies aimed at . . . the maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and the utilisation of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future; in particular the government shall provide measures against the dumping or recycling of foreign nuclear and toxic waste on Namibian territory.³³

In similar vein the Principles of National Policy in the Constitution of Malawi in Article 13 state that:

The state shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at the following goals:

d) The Environment

To manage the environment responsibly in order to:

- i) prevent the degradation of the environment;
- ii) provide a healthy living and working environment for the people of Malawi;
- iii) accord full recognition to the rights of future generations by means of environmental protection and the sustainable development of natural resources; and
- iv) conserve and enhance the biological diversity of Malawi.

Similar provisions, even though formulated differently, are found in Article 24 of the Constitution of Switzerland which empowers the federal authorities to protect and preserve the environment and further to take steps against pollution and noise. The Austrian Federal Constitutional law of 1984 also obliges federal, state and municipal authorities to protect the environment. Article 24 of the Greek Constitution does likewise but uses the formulation "natural and cultural environment" which is a wider formulation than "natural environment" used in some of the constitutions.

The equivalent provision in the Dutch Constitution is found under the chapter on Fundamental Rights even though it appears to be unenforceable.³⁴ Article 21 of the Constitution of the Netherlands simply states that:

It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment.

The fundamental difficulty with this approach is that the Constitutional provisions relating to the environment are essentially non-enforceable. Thus the utility value of such provisions

32 Section (27(1) introduces the Directives of State Policy by providing that they "shall guide Parliament, the President and the Cabinet . . . in the enactment of laws and the governance" of the country in order to establish a free and just society.

33 Article 95.

34 See generally Witzsch, "The Right to a Healthy and Decent Environment in a New Lesotho Constitution?" (1990) 6 *Lesotho Law Journal* 167.

as legal instruments, rather than political ideals, is virtually non-existent. They may be a valuable political yardstick to measure the successes and/or failures of a particular government when it comes to election time and they may also be useful for those charged with planning and adopting relevant legislation under the Constitution, but they are wholly useless for strictly legal purposes.

- (F) A sixth Constitutional approach is one which combines the fifth approach discussed above, namely the placement of a duty, by way of Directives of Policy, on the state to protect the environment, with the placement of a duty on citizens, through the Fundamental Duties of Citizens, to also protect and preserve the environment. An intriguing example is to be found in the constitution of India whose Article 48A, found within Part iv containing "Directive Principles of State Policy" states that:

The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.

This provision must be read with Article 51A(g) of the Fundamental Duties of Citizens which states that:

It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures.

In theory the utility value of this approach is as limited as that of the fifth approach discussed above and yet in practice the Indian courts have adopted innovative ways of interpreting both national legislation and the Constitution which have given practical value and meaning to the Directives of State Policy. We discuss later under Enforcement Procedures and Mechanisms some of the main issues emerging from the Indian experience, particularly the expansion of the concept of *locus standi* with the result that non-governmental organisations have been enabled to enforce environmental rights as provided in national legislation while drawing inspiration and direction from the constitutional provisions.

- (G) A seventh and somewhat unusual approach is found in Article 10 of the Declaration of Human Rights in the Constitution of Burundi which states that:

The rights and duties proclaimed and guaranteed by the Universal Declaration of Rights, the International Pacts relative to Human Rights, the African Charter on Human and People's Rights and the Charter of National Unity shall be an integral part of this Constitution.

Except for the African Charter on Human and People's Rights, none of the international instruments mentioned and brought into the domestic law of Burundi by this Article have any provision relating to environmental rights. The African Charter, in Article 24 provides that:

All peoples have the right to a generally satisfactory environment favourable to their development.

The net effect of Article 10 of the Constitution of Burundi is to make this provision of the African Charter on Human Rights part of the domestic law of Burundi and enforceable within the domestic plane.

The eighth and most comprehensive approach is one which grants citizens a Constitutional environmental right while simultaneously placing an obligation on both citizens and the state to protect and preserve the environment. Examples of this approach are found in the Constitutions of Mali, Spain, Turkey, Portugal, and Brazil. Article 15 of the Mali Constitution states that:

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Every person shall have the right to a healthy environment. The protection, defence and promotion of the environment shall be the obligations for all and for the state.

Similarly Article 45 of the Spanish Constitution provides that:

- 1) Everyone has the right to enjoy an environment suitable for the development of the person as well as the duty to preserve it.
- 2) The public authorities shall concern themselves with the rational use of all natural resources for the purpose of protecting and improving the quality of life and protecting and restoring the environment, supporting themselves on an indispensable collective solidarity.

While the provision of the Constitution of Mali is part of the enforceable and binding Declaration of Human Rights, the Spanish one is merely part of the Guiding Principles of Economic and Social Policy which basically means that even though the Spanish provision is formulated comprehensively to grant an environmental right and also to oblige individuals and the state to protect and preserve the environment, that provision is non-enforceable other than in the political sense.

The Constitution of Turkey adopts the Malian approach. Its Article 56 found under Social and Economic Rights and Duties provides that:

Everyone has the right to live in a healthy, balanced environment. It is the duty of the state and the citizens to improve the natural environment, and to prevent environmental pollution.

The Portuguese provisions even though more comprehensively and elegantly formulated are to the same effect and are as follows:

- 1) Everyone shall have the right to a healthy and ecologically balanced human environment and the duty to defend it.
- 2) It shall be the duty of the state acting through appropriate bodies and having recourse to and taking support on popular initiatives, to:
 - a) Prevent and control pollution, its effects and harmful forms of erosion;
 - b) Order and promote regional planning aimed at achieving a proper location of activities, a balanced social and economic development, and resulting in biologically balanced landscapes;
 - c) Create and develop natural reserves and parks and recreation areas and classify and protect landscapes and sites so as to ensure the conservation of nature and the preservation of cultural assets of historical and artistic interest;
 - d) Promote the rational use of natural resources, safeguarding their capacity for renewal and ecological stability.³⁵

Perhaps the most comprehensive and detailed provision falling within this approach is Article 51 A(g) of the Brazilian Constitution which reads as follows:

Everybody has a right to an ecologically balanced environment as it is a good for common use by the people, and as it is essential to a healthy quality of life; the public powers have thus an obligation to defend it, and the collectivity to preserve it, for present and future generations.

Para 1: To guarantee the effective implementation of this article, it is the responsibility of the public powers to:

- i) Preserve and restore the essential ecological processes and promote ecologically sound management of species and ecosystems;

- ii) Preserve the diversity and integrity of the genetic patrimony of the country and control activities in the field of genetic material research and manipulation;
 - iii) Determine, in all units of the Federation areas to be specially protected, together with their environmental components. Modifications or suppression of the protection of these areas may only be done by law, and any utilization of these areas which would compromise their integrity shall be prohibited;
 - iv) Submit the installation or construction of facilities which may cause significant degradation to the environment to an environmental impact assessment, which shall be prepared prior to their being initiated, and made fully available. (The siting of installations operating with nuclear reactors shall be decided by law);
 - v) Control the production, trade and use of techniques, processes and substances which may present a risk to life, to the quality of life, and to the environment;
 - vi) Promote environmental education at all teaching levels and promote the awareness of the public with regard to the preservation of the environment;
 - vii) Protect fauna and flora; prohibit by law actions that would put their ecological functions at risk, as well as activities that could lead to the extinction of species or expose animals to cruel treatments.
- Para 2: Those exploiting mineral resources have an obligation to restore the environment thereby degraded in accordance with technical means determined by the competent public authorities and by law.
- Para 3: Persons and institutions carrying out activities considered to be destructive of the environment, or behaving in such a manner, shall be liable to administrative and penal sanctions, in addition to their obligation to restore the damages caused.
- Para 4: The Amazon Forest, the Atlantic Forest, the Serra do Mar, the Pantanal, and the Coastal Zone are National Patrimony and their utilization and the use of their natural resources will be carried out as defined by law, and in such a manner as to ensure the preservation of their environments.
- Para 5: The lands which are necessary to the preservation of natural ecosystems whenever they belong to the state, cannot be put to other uses.

In all the circumstances it would appear that the eighth approach just discussed has much to commend itself as the most comprehensive, inclusive and appropriate since it grants an environmental right to citizens and at the same time obliges them together with the state to take positive steps to protect and preserve the environment.

One more point still requires further but brief discussion. As already seen above most Constitutional approaches talk of a healthy or safe or decent or favourable environment which has the effect of emphasizing the maintenance of the environment in such a state as not to be prejudicial to the physical interests of citizens. Yet there are those few constitutions which define the right in such a way as to capture the right of citizens to exploit and utilise natural resources for their individual and common benefit. Both aspects of the right are important and critical. It is in this context that the concept of the sustainable exploitation and utilisation of natural resources arises:

Accordingly it is our view that if and when Zimbabwe's Constitution is amended to include environmental rights, the formulation of the relevant clauses should capture both the aspect relating to the state of the environment (i.e. decent or healthy or safe environment) and the aspect relating to the right of the people to benefit from their natural resources.

ENFORCEMENT AND PROMOTION OF ENVIRONMENTAL RIGHTS

A fundamental and critical aspect of human rights of any description is their enforceability. Human rights may be elaborately defined, beautifully and elegantly formulated but they

will remain pure paper rights having very little significance unless there exist effective and accessible mechanisms and methods of enforcing and thereby realising them for the mass of the people. Thus it would do no good if we were to adopt a constitutional right to environmental integrity whose enforceability is elusive and inaccessible for its beneficiaries. In this context it is important that the methods for the enforcement of environmental rights be accessible, simple, inexpensive, transparent and participatory. This means that the traditionally closed, alienated, technicalised and procedurally cumbersome nature of most legal systems is ill-suited to achieve effective and meaningful enforcement of environmental rights.³⁶ In this respect, it is important to be innovative in seeking ways and means of adjusting traditional legal remedies to cope with the special difficulties which arise from judicially enforcing environmental rights. This also implies that judicial enforcement methods should be complimented by other non-judicial methods. Particularly relevant is the observation by Jill Cottrell that:

An enforcement procedure must therefore be capable of taking into consideration the implications of the decision made; it must be effective in giving remedies to those who have suffered and more important, must be capable of changing the behaviour of those who infringe such rights; and it must be capable of resisting capture by those sections of society that it is designed to control.³⁷

There is no doubt that the general classification of environmental rights as third generation rights in the sense that they may not be self-operating and hence require state initiative presents some difficulties in respect of their enforcement. But such difficulties are clearly not insurmountable. As J.D. Van der Vyver has aptly pointed out:

Enforcement of such collective rights might indeed require "ingenious procedural devices", but here, too, such devices are already at hand, including all the mechanisms of human rights implementation devised by international law, ranging from reporting systems and adverse publicity to censuring unbecoming conduct by means of sanctions and foreign intervention; and in municipal jurisdictions including class actions or even the more general *actio popularis*.³⁸

We now proceed to give an overview of some of the specific methods and devices which selected national systems have adopted and refined for both the enforcement and promotion of environmental rights.

COMPARATIVE ENFORCEMENT MODELS/METHODS

Broadly speaking four conceptually different approaches to enforcement, which are often used in conjunction with each other, are discernible from those constitutions which have recognised and implemented environmental rights. These are:

- 1 the usual judicial enforcement processes and procedures involving adversarial litigation in which those whose rights have been violated or are threatened approach the courts for appropriate relief either in systems recognising narrow or expanded *locus standi* principles;
- 2 criminalisation of conduct which violates environmental rights or which damages the environment or natural resources;
- 3 providing for civil liability embracing compensatory liability or the payment of damages to victims of violations; and

36 See generally J. Cottrell, *infra*, note 34.

37 J. Cottrell, "Third Generation Rights and Social Action Litigation" in A. Adelman and A. Paliwala, (eds) *Law and Crisis in the Third World*.

38 *Op. cit.* at p 484.

- 4 the creation of non-judicial institutions and remedies for both the enforcement and promotion of environmental rights.

Most of these approaches/remedies are often reinforced by linkage to other rights upon which environmental rights are contingent such as the right to access to information on environmental issues and options which affect the people. This emphasizes the interdependence of human rights or put differently the symbiotic link between environmental rights and other rights such as freedom of expression, the right of access to effective remedies, the right to an open democratic and accountable political system. As Professor Albie Sachs has perceptively observed:

... the possessor of rights does not exercise one set of rights in the morning, another in the afternoon and a third at night. The web of rights is unbroken in fabric, simultaneous in operation and all extensive in character.³⁹

Virtually all the constitutions which provide for justiciable environmental rights discussed above provide for traditional judicial based enforcement methods involving petitioning the courts where a violation of any rights, including environmental rights, is alleged or anticipated or feared. For example, Article 82 of the Mozambican Constitution states that:

All citizens shall have the right of recourse to the courts against any act which violates their rights recognised by this constitution and the law.

Article 82 is reinforced and expanded upon by Article 80 which provides that:

- 1 To restore rights which have been violated or infringed, or in defence of the public interest, all citizens shall have the right to present petitions, complaints and claims before the relevant authority.
- 2 All citizens shall have the right not to comply with orders that are illegal or which infringe upon their constitutional or other legal rights.

Furthermore Article 81, presumably out of an abundance of caution emphasizes the point that:

All citizens may contest acts that violate their rights recognised under the constitution and other laws.

In Mali the Constitution establishes a Constitutional Court with sweeping powers to enforce the constitution including the Declaration of Rights in which the right to a healthy environment is entrenched.⁴⁰

The Constitutions of Spain and Niger recognise criminal sanctions for violations of human rights including environmental rights recognised and protected by those constitutions. In Article 45(3) the Spanish constitution anticipates and authorises the establishment of criminal sanctions together with administrative remedies and also a compensatory system of enforcement by providing that:

For those who violate the provisions of the foregoing [article 45(1) and (2) which establish an environment right] paragraphs, penal or administrative sanctions, as applicable, shall be established and they shall be obliged to repair the damage caused.

In similar vein but more narrowly, Article 28 of the Constitution of Niger provides that:

39 Albie Sachs, "Towards a Bill of Rights in a Democratic South Africa" (1990) 6 *South African Journal of Human Rights* 1 at p.5.

40 See Article 85 and also Article 24 which places an obligation on all "to respect the constitution in all circumstances".

The transit, importation, stockpiling, burial, dumping on national property of toxic wastes or foreign pollutants on national property shall constitute a crime against the nation. Applicable sanctions shall be defined by law.

It is clear from these examples that the notion that individuals and corporations may be criminally penalised for acts which violate environmental rights is well established. The importance of criminal liability for environmental wrongs not only provides a relatively harsh regime for liability but also provides an added incentive to refrain from conduct harmful to the environment. Moreover the criminal law is generally easier to enforce and also often provides for more effective penalties. What is more the state has greater resources for enforcement than individuals, and hence enforcement of the criminal law is normally more stringent.

The importance of access to reliable information about the condition of the environment together with the principle of compensation for harm done by violators of environmental rights is clearly captured by Article 42 of the Constitution of the Federation of Russia we quoted earlier but which we repeat here:

Everyone shall have the right to a favourable environment, reliable information about its condition and to compensation for the damage caused to him or his health or property by ecological violations.

The principle of compensation ought to be extended to compensation in respect of deprivations or violations or harmful interference with the right to utilise and benefit from the natural resources available to particular social groups and/or communities.

A somewhat more comprehensive and more integrated approach to the enforcement as well as monitoring and promotion of environmental rights is to be found in the South African Constitution whose Article 38 provides that:

Anyone listed in this section has the right to approach a competent court alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach the court are;

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of or in the interest of a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interests of its members.

This formulation is extremely wide and is capable of accommodating a variety of substantive and procedural claims. It is clear that a petitioner need not be a person or body whose rights have been infringed. Thus the provision does not refer only to the fundamental rights of the petitioner but to the fundamental rights of everyone and anyone. A clearly expansive and generous approach to *locus standi* is provided for whereby anyone acting in the public interest, even if personally unaffected by the alleged violation would be permitted *locus standi*. This approach resolves virtually all the procedural difficulties to the enforcement of third generation rights, such as the right to environmental integrity, which are inherent in the traditional narrow *locus standi* approach which allows only a directly affected person to approach the courts or a person acting for an affected person who is himself/herself unable to approach the court in his/her own name.

By this provision the South African Constitution has virtually achieved all that Indian courts have achieved through an elaborate, cumbersome and somewhat strenuous process of interpreting seemingly limited provisions of a constitution which does not even recognise

an enforceable environmental right. It is interesting to note that in this judicially constructed Indian approach to Public Interest Litigation ("PIL") the rules of *locus standi* and procedure have been stretched to their breaking limit. For example, the courts have allowed petitions to be commenced by a simple letter addressed to the court, they have granted relief without even identifying what provision of the constitution is being relied upon. They have gone beyond traditional practice and actually assumed the role of policy makers and administrators, they have extended *locus standi* to organisations and individuals without any direct interest in the matter and who would ordinarily be regarded as busy-bodies; they have granted relief which does not necessarily derive logically from the rights asserted in the course of the dispute/case, and they have often allowed remedies to be negotiated by the parties.⁴¹ The expansive manner in which the Indian Supreme Court has defined and fashioned its powers in enforcing third generation rights which as we have indicated are not even justiciable but are in the constitution only as Directives of State Policy is well captured by Bhagwati C.J in *M.C Mehta v Union of India* AIR 1987 SC 1089 as follows,

It may now be taken as well settled that Article 32 does not merely confer power on this court to issue a direction, order or writ for enforcement of the fundamental rights but it also lays a constitutional obligation on this court to protect the fundamental rights of the people and for that purpose this court has all incidental and ancillary powers including the power to forge new remedies and fashion new strategies designed to enforce the fundamental rights.

Article 32 which is referred to and which the Indian Supreme Court has relied on so heavily to fashion and enforce environmental rights and to found and expand public interest litigation provides that:

- (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
- (2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warrants* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this part.⁴²

The above Indian judicial enforcement of third generation rights has been achieved inspite of the fact that Article 37 of the Indian constitution provides that;

The provisions contained in this Part [i.e. the Part containing Directive Principles of State Policy] shall not be enforceable by any court, but the principles that are laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws.

41 For a fuller discussion of the Indian experience, its constitutional basis and the cases which the courts have decided in the definition and expansion of public interest legislation see Jill Cottrell *op cit* note 34. See also Jan Glazewski, "The Environment, Human Rights and A new South African Constitution" *South African Law Journal of Human Rights*, 1991, 167 at pp176-180.

42 The provisions of the Indian Constitution recognising environmental rights by way of Directives of State Policy and by way of Fundamental Duties of Citizens are Articles 48A and 51A (g) respectively which we have already quoted and discussed above under comparative constitutional approaches. A similar provision to Articles 32 (2) of the Indian constitution is found in the Zimbabwean constitution as Section 24(4) which empowers the court in enforcing human rights provisions to make "such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Declaration of Rights." Even though this provision is more narrowly formulated than its Indian counterpart in *CCJP v Attorney General and Others*, 1993 (1) ZLR 242 (5) the Supreme Court quoting its previous remark in *In Re Mlambo* 1991 (2) ZLR 339(5) at 355C observed that "It is difficult to imagine language which would give this court a wider and less fettered discretion."

We digressed to discuss the above Indian experience to demonstrate that the comprehensive constitutional provisions embodied in the South African Constitution have in fact been borrowed from the Indian approach achieved by way of judicial interpretation. However, the South African Constitution goes further than judicial enforcement of human rights, including environmental rights, by creating other non-judicial institutions to complement and reinforce and also promote human rights observation through a variety of methods including education. The first of such institutions is the Human Rights Commission whose mandate and authority include:

- i) promoting respect for human rights and a culture of human rights;
- ii) promoting the protection, development and attainment of human rights; and
- iii) monitoring and assessing the observance of human rights within South Africa.⁴³

In performing the above mandate the Commission is empowered to;

- i) investigate and report on human rights observance;
- ii) take steps to secure appropriate redress where human rights have been violated or are likely to be violated;
- iii) carry out research in the whole field of human rights; and
- iv) carry out educational programmes and campaigns on human rights.⁴⁴

In addition to the Human Rights Commission, the South African Constitution creates the office of Public Protector⁴⁵ which is empowered "to investigate any conduct of state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice."⁴⁶ After investigating and reporting on the matter the Public Protector may take whatever remedial action he considers appropriate.⁴⁷ Clearly the powers of the South African Public Protector over human rights issues in general and environmental matters in particular are somewhat ill-defined and unclear. In contrast the Namibian Ombudsman is given much more explicit powers over environmental matters by Article 91(c) which states that the duties of the Ombudsman shall include:

the duty to investigate complaints concerning the over-utilisation of living natural resources, the irrational exploitation of non-renewable resources, the degradation and destruction of ecosystems and failure to protect the beauty and character of Namibia.

It remains to be seen what practical impact both the Namibian and South African approaches will have on environmental practice. Both the Namibian and South African Constitutions are still very young. However, both have interesting and far reaching substantive provisions on enforcement of human rights which if used innovatively and creatively provide a wide scope for effective environmental protection and development. The South African and Namibian courts and other institutions charged with enforcing and protecting environmental rights may draw useful lessons from the Indian experience where the decisions of the courts "have included the explicit adoption of a right to life approach in cases concerning pollution and environmental harm, and the imposition of a rule of absolute liability for hazardous industrial activities which goes beyond the old common law rule . . ."⁴⁸

43 See in particular Article 184.

44 *Ibid.*

45 In other jurisdictions this office is known as the Ombudsman and has similar functions and powers.

46 Section 182(1)(a).

47 Section 182 (1)(a) and (c).

48 P. W. Birnie and A. E. Boyle, *International Law and the Environment*, Oxford University Press, 1992 at p. 195.

Decisions of courts in Australia, the Netherlands, New Zealand and the United States, like their Indian counterparts, have granted *locus standi* in administrative review proceedings to environmental groups, and non-governmental organisations, on what is generally accepted to be a liberal basis.⁴⁹

Also of crucial importance to the enforcement of environmental rights is the constitutionalisation and guaranteeing of the right to freedom of information. Without a securely protected right to freedom of and access to information, environmental rights would be singularly difficult to enforce and implement particularly against big and powerful industrial and other corporations. It is in this context that P. W. Birnie and A. E. Boyle have observed that:

Freedom of information legislation may have an important effect in making it possible for individuals and environmental groups to make use of these remedies and to mount campaigns.⁵⁰

It is important in this context that section 32 of the South African Constitution guarantees the right to access to information by providing that:

- (1) Everyone has the right to
 - (a) any information held by the state; and
 - (b) any information that is held by another person and that is required for the exercise or protection for any rights.
- (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

Effective environmental protection and development not only requires guaranteed rights of access to information; an expanded concept of *locus standi* entitling NGOs to initiate and prosecute cases before the courts; constant and interlinking institutional reinforcement of human rights; and democratic ideals in an open, free and critical society, but also requires a strong, vibrant, active, and above all, vigilant civil society not only committed to human rights ideals but also imbued with a strong culture of responsibility, accountability and transparency in relation to governance in general.

COMPARATIVE INSTITUTIONAL APPROACHES/Frameworks

The development of efficient national institutions that can protect human rights is essential. They are a necessary corollary to the democratic institutions of government. This is particularly true for minorities, marginalized groups and those that lack access to financial and other resources. Accordingly, such institutions serve as a means of democratic empowerment and a check and balance on administrative authority. However, they may also help government to govern by lessening tension between government and civil society. Finally, they constitute an important mechanism for observing the state's international obligations in terms of human rights and development conventions to which it has acceded. Such institutions are particularly important given the deficiencies in the existing national system for addressing perceived wrongs and promoting one's interest as discussed in Part B above.

The establishment of national human rights institutions is important given the deficiencies inherent in the court and tribunal system. Access to justice may be hampered in the

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

contemporary system by the fact that costs in the highest courts are typically prohibitive, there are often long delays in hearing cases, it does not deal with the case in a full or holistic manner, it is limited in its investigation of administrative actions, inadequate legal remedies, problems of evidence and the adversarial nature of the action. Similarly, public enquiries are problematic as the holding of such enquiries is at the discretion of government. Further, there may be long delays in their establishment, may be more easily subject to political interference. The use of members of parliament to investigate a complaint is hindered particularly by the lack of access to resources the MP has for these purposes, the poor conditions of service which means that MPs are often engaged in additional income earning activities and hence have inadequate time, the lack of ready access to relevant information and the scale and complexity of the issues.

These institutions can take many forms. They can be set up as commissions, offices or agencies. They may be specialised or quite broad. Traditionally two categories of institutions may be identified. These are the **Office of the Ombudsman** and **Human Rights Commissions**. The functions of these were once thought of as distinct. However, in practice contemporary institutions may be a hybrid of these. Broadly, the function of the Office of the Ombudsman is to investigate complaints by individuals concerning a grievance against a government agency and its functions in the public sector. It pursues administrative justice in a manner that is confidential, informal and flexible.⁵¹ Such institutions may be responsible to the legislature or the executive. It is generally a statutory body, with wide powers of access to government documents and officials.

A Human Rights Commission may be operative within both the public and private sectors. In general, it deals with the observance and administration of anti-discriminatory and human rights legislation. Accordingly, it may also investigate administrative acts where these are contrary to human rights. In most cases the body, although appointed by the executive, would have statutory independence from the legislation and reports to the legislature. Human Rights Commissions also tend to have additional educational and advocacy functions.

For these institutions to be really effective the following must be achieved or exist:⁵²

- independence from government influence and private sector interests. This independence must be attained in all areas of the institution's operations;
- Sufficient jurisdiction and remedial powers;
- accessibility in both quantitative and qualitative terms;
- adequate resources; and
- appropriate remedies.

This sub-section discusses the various approaches to human rights institutions within other municipal systems in relation to the above factor.

Functions

Human rights institutions may have a range of functions ranging from monitoring, instituting legal action and education, for example:

- The Equal Opportunities Commission (EOC) is a statutory body responsible for ensuring compliance with the Sex Discrimination Act and the Equal Pay Act in Britain.

⁵¹ Hatchard, J (1993).

⁵² Human Rights Unit (1992).

The EOC may provide legal assistance for individuals, but it has been more concerned about its persuasive role.⁵³ To this end, it is involved in conducting enquiries, investigations and the issuing of non-discrimination notices. A fundamental role of the EOC is to enforce the law in the public interest. In partial fulfilment of this role, the EOC supports individual cases. It also has the power to undertake formal investigations in areas where there is a belief that there is an unlawful act. Further the EOC has the power to initiate proceedings in its own name in the courts or tribunal in relation to discriminatory adverts as they affect a group of people.

- The Human Rights Agency in New York City has "power to eliminate and prevent discrimination in employment, places of public accommodation, including resort or amusement parks, in housing accommodations and in commercial space because of race, colour, creed, age, national origin or physical handicap and to take other actions against discrimination."⁵⁴ Its functions are to foster mutual understanding and respect between racial, religious and ethnic groups; to encourage equal treatment for these groups; and to make investigations and studies in order to effect these functions. It has educational and persuasive powers, research powers and power to receive and pass on complaints of unlawful discriminatory acts.⁵⁵
- The *Zambian Human Rights Commission* has, *inter alia*, the powers:
 - (a) To investigate, on its own initiative, or on a complaint made by any persons or group of persons, any human rights violations;
 - (b) to establish a continuing programme of research, education and information to enhance respect for human rights;
 - (c) to recommend to the National Assembly effective measures to promote human rights, including provision of compensation to victims of violation of human rights, or their families.

The *Zambian Human Rights Commission* has the power to issue summons, question any person, subpoena anyone to give information on any issue under investigation.

It is essential for the institution to have sufficient jurisdiction and remedial powers. Further it must have sufficient jurisdiction to be able to implement the appropriate action and award the correct remedy.

Investigation

All national institutions have investigatory powers; these may be broadly described as:⁵⁶

- all investigations are undertaken in private;
- an inquisitorial procedure is adopted;
- the institution retains the right to refuse to investigate any matter on the ground that it is trivial, frivolous, vexatious or not made in good faith;
- the decision whether or not to hold an investigation is never open to challenge;
- powers to order the furnishing of information and the production of all documents;
- to order a person to submit to an investigation;
- summon and examine witnesses at a formal inquiry; and
- power to prevent interference with investigations.

⁵³ Leonard, A (1987)1.

⁵⁴ Chapter 1 *Commission on Human Rights*, Title VIII s 8-101.

⁵⁵ Chapter 1, *Commission on Human Rights*, Title VII, s 8-104.

⁵⁶ Hatchard (1993) 47.

The office of the ombudsman generally has no enforcement powers. As is the case in Zimbabwe, the resolution of problems is more at the informal level. However, there has been an extension of the powers of the ombudsman in recent years. For example, the Namibia Ombudsman Act has powers that represent those of a human rights commission: the ombudsman may institute legal action and also challenge the validity of legislation.

Such bodies may investigate *inter alia* complaints of maladministration, and violations of constitutional rights, based on international human rights norms.⁵⁷ In Pakistan, maladministration is defined as including, process, recommendation, act or omission which:

- is contrary to law, rules or regulations or is a departure from established practice or procedure, unless it is *bona fide* or for valid reasons;
- is perverse, arbitrary or unreasonable, unjust, biased, oppressive or discriminatory;
- based on irrelevant grounds; and
- involves the use of power or failure to do so for corrupt or improper motives, such as bribery, jobbery, favouritism, nepotism and administrative excesses.

Monitoring compliance with international and nationally recognised human rights

Many of the commissions have the complementary and additionally, responsibility for the monitoring of compliance with international conventions, as is the case in Australia and Canada.

Public Inquiry Powers

A significant number of institutions have the power to carry out public inquiries. This remedy is important because of the limitations of individual investigations.

Advisory Opinions

Human Rights Commissions may have the authority to issue advisory opinions where these are requested by a person who is responsible for the implementation of an activity which is in the scope of the relevant legislation.

Research

Research is part of the mandate of many of the institutions. This is based on the recognition that many of the problems currently faced in the human rights area may stem from non-legal factors. Research helps these institutions develop other appropriate strategies for the realization of rights. Additionally, it is important for the realization of yet another function: the recommending of new legislation and improvements in administration.

Education

Education is a very important aspect of commissions' activities. It is crucial for ensuring that citizens are aware of their rights and how such rights may be realised or enforced. In this regard it is important to publicise the work of the institution.

⁵⁷ Hatchard (1993) 64.

Independence

For an institution to be able to carry out these functions efficiently, it must be independent. A good starting point for establishing independence is the legal basis of an institution. It may be established as a constitutional body. There are some clear advantages to this as the constitution is the supreme law. Thus the institution is not as easily modified or disbanded as a statutory body. The danger inherent in statutory bodies is illustrated by the experience of the Lokayukta (Ombudsman) in Orissa State, India. In this state when the ombudsman sought to investigate the activities of three ministers, the Chief Minister successfully obtained the repeal of the statute establishing the institution.⁵⁸

The composition of the commission may have important implications for its independence. The United Nations⁵⁹ has set out the following requirements:

1. The composition of the national institution and the appointment of its members, whether by election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of social forces (of civil society) involved in the protection and promotion of human rights, particularly by power which will enable effective co-operation to be established with or through the presence of representatives of:
 - (a) non governmental organizations . . . and concerned social and professional associations
 - (b) trends in philosophical or religious thought
 - (c) universities and qualified experts
 - (d) parliament
 - (e) government departments in an advisory capacity
2.
3. In order to ensure a stable mandate for members of the institution, without which there can be no real independence, their appointment shall be effected by an Act which shall establish the specific duration of the mandate. This mandate may be renewable provided that the pluralism of the institution's membership is ensured.

Notwithstanding this, several jurisdictions including Canada, New Zealand and Australia have no specific qualifications for membership. Commissioners in these kinds of institutions in the United Kingdom, Ghana, Zambia and India require legal expertise. There are various human rights commissions established under the South African Constitution. No membership requirements are established for the Human Rights Commission other than that it should reflect the race and gender composition of South Africa, whereas the Commission for the Promotion and Protection of Cultural, Religious and Linguistic Communities require the commissions to be representative of the main cultural, religious and linguistic communities. Clearly in the South African context, the issue of representation is clearly linked to the purpose of the commission.

Similarly the length of appointment may affect continued independence of the office. Most jurisdictions, including Tanzania, Canada, and Nigeria have ombudsmen with fixed terms of service. Whereas Ghana, Barbados and Zambia have more permanent career type structures.

The grounds for removal and the terms and conditions of service are significant as they may affect the independence of the commissioner.

⁵⁸ Hatchard, (1993) 1.

⁵⁹ Commission on Human Rights E/CN.4/1992/L.11/Add4 page 27-28.

Accessibility

The ability of the institution to fulfil its mandate is dependent upon its efficient receiving of complaints and grievances from members of public.

Locus standi

This goes to the issue of *locus standi*, that has already been discussed. Most jurisdictions allow individual actions and representative actions. In both representative and public interest matters non-governmental organizations, trade unions and other similar associations are given standing.

The Australian Sex Discrimination Act provides that a matter may be dealt with as a representative case, where the justice of the case demands it. By contrast in a limited number of jurisdictions, complaints must channel their complaint through their MP.

However, as Hatchard argues, "in principle there is no reason for any restrictions on who may bring a complaint. National institutions should be free to decide whether to investigate a complaint based solely on its merits and not on who made the complaint."

In many jurisdictions investigations can be initiated by the institution without having received a complaint. It is necessary because many people are unaware of their rights, unaware of the means of enforcing their rights, vulnerable groups are often unable to make complaints, people may fear victimization and some of the problems may be urgent problems.⁶⁰ In New York City, a complaint must be made to the commission in writing. Alternately the commission may make such complaint on its own initiative. In Australia, the Human Rights and Equal Opportunity Commission has the power to initiate an investigation "where it appears . . . desirable to do so." In the Canadian context, the Human Rights Commission may initiate an investigation where it has reasonable grounds for doing so.

Procedures

Real access is also dependent on the investigatory and settlement processes, physical access and also access to financial resources and information. The procedures established in the hearings of the commission or in tribunals or the courts must not alienate the complainant.

The tribunals established in Britain to deal with matters of gender discrimination apply relatively informal rules of procedure and evidence. Applicants may represent themselves at a hearing or have legal/non-legal representation. Most people, however, thought it was essential to get legal advice in order to win a case. Applicants found that it was essential to keep thorough records and to adequately prepare for a trial. The Sex Discrimination Act provides a unique form of assistance to applicants that in effect helps the applicant formulate his/her case.⁶¹ A form of questions may be sent to the respondent, where the respondent fails to reply without reasonable excuse the tribunal may draw any inference from that including an inference that the respondent has committed an unlawful act.⁶² Although many applicants found that the tribunal was helpful, patient, and courteous, the experience was nevertheless daunting. The need to have access to information was also considered crucial.⁶³

60 Hatchard (1993)45.

61 SDA 1976, s74(1).

62 SDA 1975, s74(2)b.

63 Leonard (1987) 42-45.

Similarly, the granting of legal assistance, advice and support may be critical in establishing adequate access to remedies. Advice and assistance are essential. The Department of Employment study found that applicants, in sex discrimination matters, with legal representation were twice as successful than those without.⁶⁴

How effective a Human Rights Commission is depends on how physically accessible it is. Physical accessibility may have to do with size and nature of the country. In Nigeria, the Public Complaints commission has 21 state offices. Pakistan, Ghana and Tanzania all have decentralized offices.

Appropriate remedies

The commissions authority needs to go beyond mediation and attempts to find solutions through informal means. It is increasingly evident that to be meaningful they must have enforcement powers.

In Britain, a tribunal implementing the Sex Discrimination Act, may, where it finds that discrimination has occurred issue:

- an order declaring the rights of the respective parties;
- an order requiring the respondent to pay compensation corresponding to an amount that could have been ordered by a county court;
- A recommendation that the respondent take within a specific period action that is practicable for the purpose of eliminating or reducing the negative effects on the complainant to any relevant act of discrimination.⁶⁵
- Where an institution is required by the EOC or a tribunal to change a discriminatory practice, the normal sanctions for failing to do this are not available. Hence the EOC now recommends that they should be enforceable and any such obligation should be registered in a public register.

The EOC currently has the power to issue non-discrimination notices, it is recommended by the EOC that this be extended to require the cessation of specific practices.⁶⁶

In New York City, where discrimination is found to exist and if the circumstances warrant it, the commission may endeavour to eliminate the practice by conciliation, conference and persuasion. Where it is not possible to achieve this, the commission may set up a hearing. Testimony at the hearing is taken under oath but the formal rules of evidence do not apply. At the hearing the parties may represent themselves. If a discriminatory practice is found to exist, the commission shall make an order requiring affirmative action and also a requirement for the reporting of compliance.

Where the respondent is interfering in the work of the commission, the commission is entitled to apply for a restraining order through a court of law. Any person who wilfully violates an order of the commission is guilty of a misdemeanour.

Specific v General Institutions

An important issue is how well placed these institutions, with a very broad mandate, are to deal with specific areas such as environment. Their ability to effectively deal with such

⁶⁴ *Ibid.*

⁶⁵ SDA 1975, s65.

⁶⁶ *Ibid.*, p18.

matters may be influenced by their understanding of their function and priorities. Such prioritization may stem from inadequate resources both in financial and skills terms.

There is an increasing trend to create national human rights institutions with more focused mandates. In Britain, Australia and South Africa, commissions dealing specifically with gender have been established. Additionally in South Africa, the new Constitution establishes the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

In addition, the South African Green Paper on Environment proposes that a separate commission on environment be established. This is envisaged essentially as an environmental ombudsman and policy watchdog. The green paper proposes two institutional frameworks with multiple institutions to carry out various human rights commission type functions. The first proposes the establishment of an independent national office of the Environmental Commissioner. The mandate of the proposed policy watchdog would be to review and investigate environmental matters, and review environmental audits. The monitoring and enforcement of environmental standards would be located in a separate and independent inspectorate. Additionally, a national environmental advisory structure would be established with representatives of civil society and government. It would be a participatory mechanism for the development of national legislation and policy. This body would have offices at the provincial level.

The second would be similar except that auditing, liaison and information functions would be located in the Commission (whereas in the first they would be located in the department) and the inspectorate in the department of environment. It is worth noting that the commission is not specifically responsible for monitoring the compliance with environmental rights. This is presumably because this function is located in the Human Rights Commission, since a similar human rights commission does not exist in Zimbabwe. If an Environmental Commission were established, it may be prudent to locate the rights in this commission. The merits of such an approach is the establishment of a body concerned specifically with the environment. However, the major shortcoming in these proposals is an expanded bureaucracy with multiple institutions.

Experience with the EOC in Britain shows that even where an institution's function is more specific, important aspects of its mandate may be neglected unless there is adequate funding and access to skill and other resources. The EOC's functions include education, publicity and enforcement of rights.

LESSONS FOR ZIMBABWE

Developments and trends in international law have moved rapidly towards the recognition and protection of environmental rights. Examples of the constitutionalisation of environmental rights set by other countries discussed above, including Zimbabwe's neighbours, have somewhat defined or pointed out the way Zimbabwe ought to follow in the development of its own jurisprudence on environmental rights. In any event, under Article 30 of the Charter of Economic Rights and Duties of States of 1974,⁶⁷ member states of the United Nations are required and directed to take measures to protect the environment:

The protection, preservation and enhancement of the environment for the present and future generations is the responsibility of all States. All states shall endeavour to

67 General Assembly Resolution 3281 (XXIX), 29 UN GAROR, Supp CNo. 31 at 50.

establish their own environmental and development policies in conformity with such responsibility . . .

It is thus fundamentally important that environmental rights in Zimbabwe are raised to the level of constitutional recognition, entrenchment and enforcement. The issues that need to be incorporated in this right are the issues of access to natural resources, a healthy environment and cultural rights. A clause on environmental rights could provide that:

1. Everyone shall have the right to a healthy and ecologically balanced environment that is not detrimental to their health or well being and shall have a duty to defend it;
2. Everyone living in close proximity to a resource shall be entitled to participate in the management of that resource and to be consulted in decision-making that affects their interest;
3. Everyone shall have the right to have the environment protected, for the benefit of the present and future generations.
4. It shall be the duty of the state, acting through appropriate bodies, and having recourse to and taking support on popular initiatives, to:
 - (a) Prevent and control pollution, its effects and harmful forms of erosion;
 - (b) Order and promote regional planning aimed at achieving a proper location of activities, balanced social and economic development, and resulting in biologically balanced landscapes;
 - (c) ensure that all development is subject to prior strategic environmental planning and zoning, assessing the ecological status of an area in which developers have an interest;
 - (d) ensure that all development is subject to prior environmental and social impact assessment;
 - (e) create and develop protected areas so as to ensure the conservation of nature and the preservation of cultural assets of historical and artistic interest;
 - (f) promote the rational use of natural resources, safeguarding their capacity for renewal and ecological stability;
 - (g) preserve and restore the essential ecological processes and promote ecologically sound management of species and ecosystems;
 - (h) preserve the diversity and integrity of the genetic patrimony of the country and control activities in the field of genetic material research and manipulation;
 - (i) control the production, trade and use of techniques, processes and substances which may present a risk to life, to the quality of life, and to the environment;
 - (j) promote environmental education at all teaching levels and promote the awareness of the public with regard to the preservation of the environment; and
 - (k) promote the use of indigenous knowledge systems and preservation of traditional knowledge in the management of the environment and conservation of the biodiversity.

Whatever constitutional environmental provisions are accepted and adopted, they could be greatly enhanced by enforcement models which allow for a simplification and deformalisation of judicial procedures and the introduction of other institutional enforcement and promotion mechanisms such as a Human Rights Commission and a revamped, independent and highly visible Ombudsman. Of equal importance is the adoption, through the Constitution, of an expansive and flexible *locus standi* approach such as is contained in the South African Constitution. Also crucially important are other reinforcing constitutional provisions relating to access to information, administrative justice including transparency, accountability, lawfulness, reasonableness, justice, procedural fairness and participation. Thus it is our view that there is a need for constitutional

provisions, presently absent, in the Declaration of Rights recognising and implementing the right of access to information and the right to fair and just administrative action. Sections 32 and 48 of the South African and Zambian Constitutions respectively could provide useful starting points for the right to access to information.⁶⁸

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⁶⁸ Section 48 of the Zambian Constitutions is worded thus: "every person shall have the right to access to information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights or freedoms guaranteed in this constitution". We have already quoted the South African provision above.

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